Office-Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-401

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

BAXTER RICE,
Individually and as Director
of the Department of Alcoholic
Beverage Control of the State
of California,

PETITIONER,

v.

EVA REHNER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Respondent disagrees with petitioner's statement of the questions presented. Based on the facts presented and the arguments advanced by the parties in the courts below, the questions presented for resolution by this Court are:

1. Does 18 U.S.C. §1161 grant to the states the authority to license the sale of liquor by a reservation Indian doing business in Indian country?
2. If 18 U.S.C. §1161 does not so authorize the states, does the Twenty-first Amendment provide an independent source of such licensing authority?

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STATEMENT OF THE CASE

Respondent is in general agreement with petitioner's statement of the case. However, a couple of additional facts that were not included in petitioner's statement bear mentioning here.

First, at the time this suit was filed in the District Court, a California off-sale general liquor license sold on the open market for approximately $55,000. J.A. 9. Second, at certain intervals the California Department of Alcoholic Beverage Control has issued such licenses for a lesser sum, but those licenses were issued by lottery system only to those few persons fortunate to have their names drawn at random. J.A. 9. The Court of Appeal's decision allows respondent, a reservation Indian, to sell liquor from her general store on the Pala Indian Reservation free of these and other aspects of the state licensing scheme.

SUMMARY OF ARGUMENT

Contrary to petitioner's contention, 18 U.S.C. §1161 does not grant to the State of California the authority to regulate through licensing a reservation Indian (and licensed Indian trader), such as respondent, who proposes to sell liquor from her general store on the Pala Indian Reservation. Rather, that statue only requires the act of selling or distributing liquor (the "act or transaction") to be in harmony with state standards. These standards are those that reflect important state policies, such as protecting minors from the dangers associated with alcohol consumption, but do not encompass the whole range of state liquor regulatory procedures, especially those designed primarily as enforcement and revenue-raising mechanisms, such as licensing requirements.

Section 1161 must be read as respondent proposes given the lack of clear indications of congressional intent in the language and

legislative history of the statute to grant such jurisdiction to the states; the language of other, contemporaneous acts of Congress dealing with similar subject matter; traditional notions of tribal sovereignty and the federal policy of encouraging tribal self-government; the interpretations of §1161 by the agency charged with its administration; and the preemptive control that the federal government has exercised for more than a century over Indian liquor transactions in particular and Indian commerce in general.

Through many decisions dealing with Indian affairs and interests, this Court has fashioned specific canons of statutory construction to guide the federal courts in the task of interpreting federal statutes, such as §1161, which affect individual Indians and tribes. These canons are unique to Indian cases and reflect the important federal policy of protecting the right of Indian tribes and people to make their own

laws and be governed by them, free from state jurisdiction and control. As the discussion below indicates, the Court of Appeals faithfully and correctly applied these canons in reaching the interpretation now urged by respondent in this Court.

Petitioner asserts for the first time in this Court that the Twenty-first Amendment is an independent source of state jurisdiction in this case. This Court, however, has held that the Twenty-first Amendment increased the states' power to regulate liquor within their respective jurisdictions, but in no way increased their jurisdiction over federal reservations within state boundaries. These holdings apply with particular force to Indian reservations because of the preemptive federal power over Indian liquor transactions and over Indian commerce in general.

Petitioner attempts to avoid this straightforward application of Indian law principles in interpreting §1161 by raising

a host of hypothetical problems that might allegedly occur if this Court upholds the Court of Appeals' decision. There is no factual support in the record to support petitioner's parade of horribles. Moreover, these imagined fears are contradicted by the actual experience of other states in concrete factual situations involving tribal licensing of reservation liquor transactions; by the California Legislature's prompt and unreserved acquiescence in the Court of Appeals' decison; and by the presence of an adequate federal/tribal enforcement scheme.

ARGUMENT

I. IN CONCLUDING THAT CONGRESS DID NOT INTEND 18 U.S.C. §1161 TO CONFER ON THE STATES LICENSING JURISDICTION OVER RESERVATION INDIANS, THE COURT OF APPEALS PROPERLY INTERPRETED THE STATUTE.

A. Well-Established Rules Of Statutory Interpretation In Indian Cases Demonstrate That 18 U.S.C. §1161 Is Reasonably Subject To Only The Reading Given It By The Court Of Appeals.

In interpreting §1161 the Court of

Appeals started with the premise that state jurisdiction over Indian reservations is strongly disfavored and that state laws are generally inapplicable to tribal Indians except where Congress has expressly provided that they shall apply. Rehner v. Rice, 678 F. 2d 1340, 1343 (9th. Cir. 1982) ["Rehner"]. The Court of Appeals then conducted a painstaking analysis of §1161, applied the canons of construction that this Court has consistently used in interpreting federal statutes affecting Indians, and concluded that §1161 was reasonably susceptible to only the construction which precludes state licensing jurisdiction over reservation Indians such as Mrs. Rehner. 1/

1. Early in its brief on the merits, petitioner uses the term "control," instead of "regulation" or "jurisdiction," in asserting licensing authority over Indian country liquor retailers. However the petitioner may characterize its intent, there is no question that licensing is one of the means by which the State of California regulates liquor retailers and enforces it liquor laws. Later in its brief, petitioner candidly states that "[B]y removing state licensing authority, (cont'd on next page)

Petitioner's claim that §1161 is a grant of state licensing authority over Mrs. Rehner simply ignores these well-established canons of statutory construction, as well as the legal principles and policy considerations that underlie the unique relationship between Indian people and the federal government.

1. There is no clear and express congressional grant of state licensing jurisdiction in 18 U.S.C. §1161.

Before a court may conclude that Con-

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1. (cont'd). the court has removed state enforcement authority . . ." P.B. at 74. Clearly petitioner seeks regulatory authority over Mrs. Rehner.

Petitioner attempts to read into the Court of Appeals' decision a distinction between regulatory jurisdiction over the subject matter and judicial jurisdiction over the person, while asserting that the Court was concerned with the latter in rejecting state licensing jurisdiction over reservation Indians. P.B. at 56. This novel suggestion ignores repeated references by the Court of Appeals to "licensing and distribution jurisdiction," Rehner, 678 F. 2d at 1346, 1348, 1349, 1351. As a practical matter, it seems a bit ridiculous to contend, as petitioner does, that the State can claim "power over a license" without claiming similar power or authority over the licensee.

gress intended to grant to states jurisdiction over the activities of reservation Indians, the court must find a clear and unambiguous statutory authorization for such state jurisdiction:

> State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-71 (1973) ["McClanahan"]; see also Bryan v. Itasca County, 426 U.S. 373, 376-79 (1976) ["Bryan"]; Moe v. Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, 425 U.S. 463, 475-76 (1976) ["Moe"]; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 ["White Mountain Apache"]. This principle is derived from the plenary power of Congress under the Indian Commerce Clause, Art. 1, §8, cl. 3, and from traditional notions of Indian self-government. White Mountain Apache at 142-43; Ramah Navajo School Board,

Inc. v. Bureau of Revenue, ___ U.S. ___, 73 L. Ed 2d 1174, 1180 (1982) ["Ramah"]; United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation . . . Significantly, when Congress has wished the states to exercise this power, it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.

Williams v. Lee, 358 U.S. 217, 221 (1969); see also United States v. Burns, 529 F. 2d 114, 117 (9th Cir. 1976).

Petitioner ignores this basic canon of construction since there clearly is no express grant of state jurisdiction in §1161. State jurisdiction is not even mentioned and the statute itself "is not cast in the form of a jurisdictional grant to anyone" (emphasis added). Rehner, 678 F. 2d at 1345. Petitioner also ignores that the only mention of jurisdiction contained

in §1161 is made in reference to "the tribe having jurisdiction over such area of Indian country . . ." (emphasis added). Id.

A corollary to this rule of construction which further supports the Court of Appeals reading of §1161 creates a presumption that Congress, unless it clearly indicates otherwise, intends to continue its policy of allowing reservation Indians to govern themselves free from state control. Accordingly, in construing federal legislation affecting Indians this Court has presumed, in the absence of clear indications to the contrary, that no radical departure in congressional policy toward Indian people is intended and that traditional immunities have been preserved. See Morton v. Mancari, 417 U.S. 535, 541, 549-551 (1974); Bryan, 426 U.S. at 381, 392-393; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); In re Heff, 197 U.S. 488, 499 (1905).

This presumption of congressional intent is further supported by specific

federal legislation both before and after the 1953 enactment of §1161, reflecting a policy that encourages reservation Indians to govern themselves free from state control. The 1934 Indian Reorganization Act, 48 Stat. 987, 25 U.S.C. §476, promoted tribal self-government by providing a mechanism by which Indian tribes could adopt new constitutions and restructure their governments. Fisher v. District Court, 424 U.S. 382, 387 (1976). More recent federal laws have furthered tribal self-government and promoted tribal economic development. See, e.g., the Indian Finance Act, 88 Stat. 77, 25 U.S.C. 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. 450 et seq.. Federal enactments affecting Indians must be read in light of these policies. See Bryan, 426 U.S. at 387-388 and n. 14; Ramah, 73 L. Ed 2d at 1185.

State licensing and taxation of reservation Indians are among the clearest exam-

ples of state actions that interfere with these federal policies and inherent tribal powers. See McClanahan, 411 U.S. 164; Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 690-91 (1965) ["Warren Trading Post"]; Bryan, 426 U.S. at 377; "Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation," 78 I.D. 39, 41-42 (February 3, 1971).

Moreover, Congress has consistently given any proposed extensions of state jurisdiction over reservation Indians "comprehensive and detailed scrutiny." Kennerly v. District Court, 400 U.S. 423, 426-27; Santa Rosa Band of Indians v. Kings County, 532 F. 2d 655, 661 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). In Santa Rosa the Court of Appeals noted the disastrous impact which a state veto over tribal economic development would have. Id. at 664 and n. 14. An analogous situation would exist in this case, if the intrusive and economically burdensome aspects of California's liquor

licensing scheme were imposed on Mrs. Rehner or other reservation Indians. See discussion, infra, at Section V(B).

Petitioner's reading of §1161 not only departs from the general rules of construction and federal policies described above, but is inconsistent with this Court's interpretation of §1161 in United States v. Mazurie, 419 U.S. 544 (1975) ["Mazurie"]. Mazurie held that Congress through §1161 delegated to tribal governments a share of its broad authority over liquor in Indian country. Rather than suggesting an abandonment of the federal policy promoting tribal self-government, the Court specifically relied on recognition of tribal sovereignty to justify the Congressional decision to delegate federal legislative authority to Indian tribes. Id. at 556-557.

Rather than granting the state jurisdiction, §1161 merely provided a procedure for a tribe "having jurisdiction over such area of Indian country" to lift the absolute

bar of the federal Indian liquor laws and accept the delegation of regulatory power over liquor transactions that the Court upheld in Mazurie. Once that procedure is completed and the tribe's liquor ordinance is properly certified by the Secretary of the Interior and published in the Federal Register, the ordinance governs liquor transactions in that area of Indian country.

In the face of the applicable rules of construction and federal policies, and Mazurie, petitioner relies upon the decision in Maine v. Thiboutot, 448 U.S. 1 (1980) ["Thiboutot"], to negate the Court of Appeals' holding that the phrase "laws of the State," as used in §1161, does not include the State's licensing and regulatory laws. P.B. at 9, 20-21. Such reliance is misplaced. The statutory language reviewed in Thiboutot concerned the scope of individual rights under a federal statute (42 U.S.C. §1983) which this Court construed in light of its historic function to protect

such rights, and is simply not comparable to §1161 which applies to persons and areas that have historically and constitutionally been subject to the plenary power of Congress, and beyond the jurisdiction of the states.

Finally, just as this Court in Thiboutot found that the "consistent treatment" of the "and laws" provision in earlier cases encompassed violations of federal statutory provisions other than civil rights or equal protection laws, Thiboutot, 448 U.S. at 447-48, so also this Court has consistently held that grants of jurisdiction to states over tribal members and reservations cannot arise by vague reference or implication, but must be express. McClanahan, 411 U.S. at 170-71; Bryan, 426 U.S. at 376-79; Moe, 425 U.S. at 475-76; Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655-56 (1978); White Mountain Apache, 448 U.S. at 143-44.

2. Reading 18 U.S.C. §1161 in para materia with P.L. 280 and the Termination Acts precludes reading into 18 U.S.C. §1161 a grant of jurisdiction to the states.

To determine congressional intent in enacting §1161, the Court of Appeals properly examined the language of both Public Law 280, 67 Stat. 589, 18 U.S. 1162, 28 U.S.C. 1360, and the Termination Acts in construing the language of §1161. This analysis placed the language of §1161 in its proper legislative context.

Pub. L. 280 and 18 U.S.C. 1161 were passed by the same Congress in 1953, within a few days of each other. The difference in the language of the two statutes, however, is striking. Pub. L. 280 contains an express grant of jurisdiction to the states, giving them authority to enforce certain state laws in Indian country. 2/ Section

2. Notwithstanding this express grant to the states of civil jurisdiction in Indian country this Court refused to read that jurisdictional grant as encompassing the kind of full civil regulatory jurisdiction over Indians in Indian country sought by the state herein. (cont'd on next page)

1161 contains only an "oblique reference" to state law. Rehner, 678 F. 2d at 1346.

Reading §1161 in para materia with Pub. L. 280, the Court of Appeals observed that

> In contrast to section 1161, Pub. L. 280 expressly grants civil and criminal jurisdiction to the states. In so doing, Congress expressed its intent with words similar to those employed in its reference to jurisdiction of the tribes in section 1161. * * * There is no language in section 1161 indicating that the states were granted jurisdiction

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2. (cont'd.) Bryan, 426 U.S. at 384. This narrow construction of the express grant in Pub. L. 280 was based in part on the absence in its legislative history of any discussion of general civil regulatory jurisdiction. A fortiori, a similar absence in the legislative history of §1161 (see discussion, infra, at Section III) compels the conclusion that the statute does not grant licensing authority over reservation Indians to the states, because that statute, unlike Pub. L. 280, does not contain any express grant of jurisdiction whatsoever. Even as a matter of policy petitioner has failed to provide any reason for this Court to depart from the approach it took in Bryan. Petitioner has failed to meaningfully distinguish its interest in licensing Indian liquor sellers from its interest in regulating other subject matter affecting the public health and safety.

> over Indian country liquor transactions.

Id. at 1346. By reading §1161 in para materia with P.L. 280, any potential ambiguity that otherwise might arise if it were read outside of its legislative context is eliminated. Thus, P.L. 280 provided an essential interpretive device for construing §1161:

> A close examination of Pub. L. 280 reveals, then, that when Congress has extended state jurisdiction over Indian country it has done so affirmatively by using precise language, not by oblique reference to state law.

Rehner, 678 F. 2d at 1346.

The Court of Appeals similarly construed §1161 in para materia with the Termination Acts and pointed out that "[t]he Termination Acts are replete with language expressly conferring jurisdiction upon the states" (emphasis in original text) and that a "[v]ague reference to the laws of the State, as found in section 1161, was never

assumed to suffice as a grant of jurisdiction" (emphasis added). Rehner, 678 F. 2d at 1345.

In marked contrast to the language of both Pub. L. 280 and the Termination Acts is the total absence of any mention of state "jurisdiction" in 18 U.S.C. §1161. There is no mention that state liquor laws shall have the "same force and effect" (see 18 U.S.C. §1162 and 28 U.S.C. §1360(a)) in Indian country as elsewhere, or that the "laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens . . ." (see 25 U.S.C. §726). The same Congress that enacted §1161 obviously knew how to make clear an intent to confer state jurisdiction over reservation Indians and knew how to express a congressional intent to extend state laws to Indian country.

Contemporaneous acts of Congress regarding the applicability of state laws in Indian country must be considered in pari

materia and construed together. Comparing the several Termination Acts mentioned above to Pub. L. 280 led this Court to conclude that Pub. L. 280 did not authorize state civil regulatory authority on Indian reservations. Bryan, 426 U.S. at 389-390; see also, Menominee Tribe v. United States, 391 U.S. 404, 411 (1968); Santa Rosa Band of Indians v. Kings County, supra, 532 F. 2d at 662 n. 9. Similarly, a comparison of §1161 with Pub. L. 280 and the termination acts discussed in Bryan compel a conclusion that state licensing of Indians in Indian country was not intended.

B. Prior Decisions By This Court Rebut The So-Called "Plain Meaning" That Petitioner Attributes To The "In Conformity With" Language Of 18 U.S.C. §1161.

Applying the canons of construction discussed above, this Court need go no further. There is no clear, express grant of licensing jurisdiction to the states in §1161. The decisions in Moe, McClanahan, and Bryan are dispositive.

Nevertheless, petitioner argues that the "in conformity with" language of §1161 "plainly means" [3] that Mrs. Rehner must submit to the State's liquor licensing scheme. P.B. at 21-23. Prior decisions by this Court, however, have construed similar language contrary to the meaning urged by petitioner in a way that precludes any requirement that federal installations submit to state licensing authority. Hancock v. Train, 426 U.S. 167 (1976); Environmental Protection Agency ["EPA"] v. State Water Resources Control Board, 426 U.S. 200 (1976).

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3. Petitioner's suggestion that the clarity of the statute's words precludes recourse to other interpretive aids attempts to resurrect the largely discredited "plain meaning rule." See Merz, The Meaninglessness of the Plain Meaning Rule, 4 U. Dayton L. Rev. 31 (1979); Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975). Since even the simplest words can be understood differently in different contexts, this argument has been rejected by modern courts. Cass v. United States, 417 U.S. 72, 78-79 (1974).

In Hancock this Court held that the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 (recodified at §7401), did not authorize States to require that federal installations obtain state operating permits. Id. at 198-99. The requirement that federal installations "shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements" (42 U.S.C. §1857f; recodified at §7418) did not require the federal installations to comply with all State requirements, including State permit requirements, especially where the statute "does not identify the applicable requirements." Id. at 182. The Court distinguished between State substantive and procedural requirements and rejected Kentucky's argument "that Congress necessarily implied the power to enforce from the conceded authority to develop and set emission standards." Id. at 183.

Kentucky's argument that a duty to comply with state standards would be "utterly meaningless" absent state enforcement power was based on the same faulty assumptions -- a lack of other enforcement authority and an implied congressional intent to grant the states such authority -- on which the petitioner here bases its similar argument. The Court in Hancock rejected both assumptions, id. at 183-84, in holding that the compliance mentioned in the statute did not include submission of federal installations to state permit requirements and attendant state enforcement power.

Similarly, in the companion case of EPA V. State Water Resources Control Board, supra, 426 U.S. 200, this Court held that the compliance language of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1323, did not authorize States to require federal installations to obtain state operating permits.

Thus, in both Hancock and EPA, this

Court construed language similar to the "in conformity with" language of §1161 and concluded, as the Court of Appeals did in the context of Indian country liquor transactions, that Congress intended state substantive standards to apply to the particular activities involved, but did not intend, nor clearly express, any grant of licensing jurisdiction or enforcement power to the States. 4/

Petitioner's reliance on California v. United States, 438 U.S. 645 (1978), in arguing to the contrary is entirely misplaced.

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4. The mere incorporation of state standards does not connote either the inapplicability of federal law or a transfer of enforcement jurisdiction to the states. See, e.g., the Assimilative Crimes Act, 18 U.S.C. §13, and the Major Crimes Act, 18 U.S.C. §1153. More recently, in revising the regulations governing federal Indian traders, the Bureau of Indian affairs has proposed to modernize them by adopting as its regulations the consumer protection laws of the state where the business is located. 47 Fed. Reg. 48,492 (1982). This is another example of utilizing state substantive standards without a transfer of federal jurisdiction.

P.B. at 21-23. A fair reading of that lengthy opinion reveals that the Court's decision acknowledging that state permit requirements govern the appropriation of water for federal water projects was reached against the unique backdrop of a limited federal deference to state water law in the reclamation of arid lands of the Western States. Id. at 653 and 663. Petitioner, however, argues (without a single citation of authority in support) that "the deference accorded by Congress to state water laws is identical to the deference Congress has given to state liquor laws." P.B. at 22-23. [5/] This bald assertion ignores over a century of preemptive federal control of

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5. The argument that the "conformity" language of §8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §372, mandates the application of state water law and permit procedures to non-reclamation federal lands was explicitly rejected in Cappaert v. U.S., 426 U.S. 128, 143 n. 9 (1976), illustrating how narrowly such "conformity" language is construed. Where federal lands are concerned, there simply is no general "deference" to state water law.

liquor transactions involving Indians, as well as numerous federal court decisions which not only demonstrate no historical deference to state liquor laws where Indians and Indian country are concerned, but also serve to illustrate the federal government's active and successful opposition to state attempts to assert such control. See discussion, infra, at Section IV(A). Congress has repeatedly signalled its deference to State water law in the reclamation context, but has just as forcefully guarded its preemptive authority over Indian liquor transactions. While the "conformity" language of §8 of the Reclamation Act of 1902 may be superficially similar to the "in conformity with" language of §1161, the holding in California v. United States, supra, is simply not applicable in this context.

C. Any Ambiguity That Exists In 18 U.S.C. §1161 Must Be Resolved In A Way That Protects Mrs. Rehner's Right To Engage In The Sale Of Liquor Without First Obtaining A State Liquor License.

If this Court should determine that

§1161 is ambiguous regarding the extent of state licensing authority over Mrs. Rehner, a reservation Indian, under applicable precedent it must resolve the ambiguity in her favor. Bryan, 426 U.S. at 392; see, also, Northern Cheyenne Tribe v. Hollow-breast, supra, 425 U.S. at 655 n. 7; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1919); Choate v. Trapp, 224 U.S. 665, 675 (1912); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832); Santa Rosa Band of Indians v. Kings County, supra, 532 F. 2d at 660. This "eminently sound and vital canon of construction," Northern Cheyenne Tribe v. Hollowbreast, supra, reflects the protected status of reservation Indians and Indian tribes under federal law, as well as the judicial admonition that courts should not presume, in the absence of express language to the contrary, that Congress has acted in a manner that would subject them to state jurisdiction and control. By interpreting ambiguous statutes

in favor of the Indians, the courts attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations. Squire v. Capoeman, 351 U.S. 1, 7-8 (1956).

The only construction of §1161 that is favorable to Mrs. Rehner and the Pala Band is one which upholds "traditional notions of Indian self-government," White Mountain Apache, 448 U.S. at 143, and recognizes the preemptive role that Congress and tribal governments play in regulating liquor in Indian country. See Mazurie, 419 U.S. 544.

In White Mountain Apache, Justice Marshall emphasized that these traditional notions of Indian self-government provide an important backdrop "against which vague or ambiguous federal enactments must always be measured." Id., at 143. See, also, Ramah, 73 L. Ed 2d at 1185. Moreover, as we point out elsewhere in this brief (see discussion, infra, at Section V(B)), interpreting the statute so as to impose state licensing and

regulatory authority on reservation Indians engaging liquor sales could totally thwart the tribal exercise of powers specifically delegated under §1161. Such an implicit divestiture of tribal authority in favor of state jurisdiction cannot be squared with the Court's own admonition that

> "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."

Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L. Ed 2d 21, 37 (1982) ["Merrion"]; citing Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 60.

II. THE DEPARTMENT OF INTERIOR'S READING OF 18 U.S.C. §1161 IS CONSISTENT WITH THAT OF THE COURT OF APPEALS AND IS ENTITLED TO GREAT WEIGHT AND DEFERENCE.

As respondent argued in the Court of Appeals, courts accord great weight and deference to "the interpretation given [a] statute by the officers or agency charged

with its administration." Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 556 (1980).

The Department of the Interior ("Department"), and the Bureau of Indian Affairs ("Bureau"), have broad experience in the complex tripartite jurisdictional relationship between the federal government, Indian tribes, and states, and in the management of Indian liquor trade. The Bureau has traditionally served a major role with regard to Indian liquor regulation:

> From an early day . . . it has been one of the important duties of the Indian Office to aid in the enforcement of [Indian liquor] legislation . . .. Further, there can be no question that the authority of the Department in its undertaking to suppress the forbidden traffic extended to every matter in which its aid was appropriate. That was the clear import of the legislation broadly defining its powers.

[Emphasis added.]

United States v. Birdsall, 233 U.S. 223, 232-35 (1914).

Thus, administrative interpretations of §1161 by the Bureau and the Department are entitled to great weight since they emanate from the agency charged with the administration of the Indian liquor laws. Cf. Howe v. Smith, 452 U.S. 473, 485 (1981) [deference to Bureau of Prisons in penal matters]; Blum v. Bacon, ___ U.S. ___, 72 L. Ed. 2d 728, 736 (1982) [expertise of Secretary of Health, Education & Welfare on AFDC issues]; Northern Cheyenne Tribe v. Hollowbreast, supra, 425 U.S. at 660 [deference to Department regarding Indian allotments].

The United States Department of Justice, as amicus curiae in the proceedings below, has articulated the Department's (and the Bureau's) official position that neither §1161 nor Pub. L. 280 authorize the states to license reservation Indians engaging in the sale of liquor on Indian reservations:

> . . . nothing in 18 U.S.C. §1161 or in the Pala tribal ordinance requires Rehner to obtain a state off-sale general license to sell liquor at her store on the Pala Reservation. 18 U.S.C. §1161 leaves the regulatory power over Rehner's activities to the tribe and the federal government . . .. Liquor licenses, and the taxes imposed as fees for such licenses, clearly fall outside the area of jurisdiction granted in P.L. 280.

Brief of the United States, 16-17.

That has been the Department's position for many years. As early as 1971, the same issue arose in Montana. In a formal published opinion, the Department ultimately resolved the question in a manner similar to the Court of Appeals' decision:

> In summary, we believe the Chippewa Cree Tribe may license a liquor establishment owned or controlled by the Tribe or tribal members on the Rocky Boy's Reservation without obtaining a license from the State of Montana or abiding by the prescribed quota system. If a tribal member commits an act or engages in a

> transaction not in conformance with Montana law he may be subject to prosecution for violating the Federal Indian liquor laws.

"Applicability of the Liquor Laws of the State of Montana on the Rocky Boy's Reservation," 78 I.D. 39, 43 (Feb. 3, 1971).

Subsequent to that decision, the United States, on behalf of the Mescalero Apache Indian Tribe, sued to enjoin the State of New Mexico from imposing its liquor licensing laws on the Tribe's resort operation. The same result was reached in that action by both the district court and the Court of Appeals as was reached by the Ninth Circuit Court of Appeals herein: the Department's position was upheld. United States v. New Mexico, 590 F. 2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979).

In determining the weight to be given to an administrative agency's position, several factors have been identified, including the thoroughness of the agency's con-

sideration, the validity of its reasoning, the consistency of the agency position, and the position's conformity to the underlying purposes of the statute. Federal Election Commission v. Democratic Senatorial Compaign Committee, 454 U.S. 27 (1981); Udall v. Tallman, supra, 380 U.S. 1. The Department's position satisfies all of these concerns. It has been thoroughly considered in several formal settings, including litigation and formal published opinions, rather than mere informal remarks. Cf. Goolsby v. Blumenthal, 581 F. 2d 455, 458 n. 5 (5th Cir. 1978), reversed en banc on other grounds, 590 F. 2d 1369 (5th Cir. 1979) [speech by head of agency at public meeting afforded little deference]; 2A Sutherland Statutory Construction, §49.06 at 249 (4th ed. Sands 1973). The validity of the Department's reasoning is buttressed by its acceptance by all independent tribunals that have considered the question, with the sole exception of the district court herein.

United States v. New Mexico, supra, 590 F. 2d 323; Zaste v. North Dakota, Civ. N. A1-75-29 (D.N.D.1/31/77); Rehner, 678 F. 2d 1340. Similarly, the Department has been consistent in its views on §1161. Finally, the Department's view is in harmony with the avowed intent of §1161, which was originally intended to remove liquor law discrimination against Indians. H.R. 1055, 83rd Cong., 1st Sess. (1953); P.B., Vol. II at A-4.

This Court has observed that "administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." Miller v. Youakim, 440 U.S. 125, 144 (1979). Since the Department actively participated in drafting §1161 its position is entitled to even greater deference.

III. THE LEGISLATIVE HISTORY OF 18 U.S.C. §1161 REFLECTS NO INTENT BY CONGRESS TO GRANT STATES LIQUOR LICENSING JURISDICTION IN INDIAN COUNTRY.

A. Petitioner's Legislative History Arguments Are Unpersuasive.

Petitioner argues that §1161's legislative history "conclusively establishes" Congressional intent to impose state liquor licensing laws on reservations. P.B. at 31-38. This, according to petitioner, is shown by negative implication: that since the legislative history fails to discuss Indian retailers or jurisdiction, and addresses only the removal of discrimination, resulting state jurisdiction was assumed by Congress. P.B. at 31, 37-43. Leaving aside, momentarily, the violence such an assumption does to established principles of Indian law, petitioner's argument is flawed because such a negative inference cannot furnish the requisite congressional intent. See discussion, supra, at I(A) & (C).

Also, petitioner mistakenly asserts that the removal of discrimination against

Indians necessarily implies an intent to place them on a legal par with other state citizens, without regard to their Indian status. P.B. at 31-33, 35, 37. Petitioner seems to argue that the price for removing that discrimination was intended to be a sort of de facto "termination," at least with regard to alcohol, since otherwise the Indians' status would place them "in a position superior to non-Indians." P.B. at 35. Such an argument ignores the precedents of this Court upholding differential treatment of Indians because of their unique legal status and the existence of the federal/Indian relationship. See, e.g., Morton v. Mancari, supra, 417 U.S. 535. It also ignores the obvious fact that differential treatment is not necessarily preferential treatment, and that despite the states' traditional reluctance to recognize it, their Indian citizens are in fact treated differently in some

respects. [6] To deny them that "different-ness" would have the effect of erasing an entire Title of the United States Code (25 U.S.C.) and two hundred years of legal precedent. Morton v.Mancari, supra, 417 U.S. at 552. While petitioner might welcome such a change, it simply cannot be inferred from Congressional silence.

The courts that have examined the legislative history of §1161 have found little evidence of the clear Congressional intent that petitioner professes to find. The Court of Appeals noted "the complete absence of any discussion concerning state

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6. A similar unwillingness to recognize the unique status of Indians and Indian reservations is illustrated later in petitioner's brief, where it argues that "[t]here is absolutely no reason why state licensing laws should be applied on the one side of the street . . . and not be allowed to apply on the other side simply because the latter is Indian country." P.B. at 81. Clearly, the same could be said of military reservations, national parks, and other areas beyond the reach of state jurisdiction, and in fact of any border separating different spheres of jurisdiction.

licensing and jurisdiction over liquor." Rehner, 678 F. 2d at 1346. The Tenth Circuit concluded that the materials "fail to evidence the kind of intent and purpose which New Mexico seeks to establish." United States v. New Mexico, supra, 590 F. 2d at 329. Even petitioner admits that the history is "rather sparse," and that jurisdictional questions were generally not discussed. P.B. at 31, 37. Far from clearly expressing legislative intent, the materials are instead vague, ambiguous and somewhat contradictory on these questions, and therefore are of limited value in construing the statute.

This Court in Gemsco v. Walling, 324 U.S. 244, 260 (1944), observed that such a legislative history "through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." This sort of construction through ambiguity is particularly dangerous in Indian cases.

See Merrion v. Jicarilla Apache Tribe, supra, 71 L. Ed 2d at 37, citing Santa Clara Pueblo v. Martinez, supra, at 60.

In the absence of clear legislative history, resort to additional means of interpretation is required. United States v. Dickerson, 310 U.S. 554, 562 (1940). Nevertheless some persuasive (if not dispositive) evidence in favor of respondent does appear in the legislative history.

B. The Legislative History That Does Exist Indicates That Congress Intended No Major Changes In The Jurisdictional Scheme.

The underlying purpose of Congress in passing 18 U.S.C. §1161 was to end the absolute federal prohibition on the sale of intoxicants to Indian people and on possession and introduction of liquor in Indian country. These prohibitions were considered exceptionally and unjustifiably discriminatory. See, "Eliminating Certain Discriminatory Legislation Against Indians In The United States," H. R. Rep. No. 775, 83rd

Cong., 1st Sess. (1953).

During consideration in the preceding year (1952) of draft legislation that eventually was enacted as Pub. L. 280, a provision on liquor control was inserted to accomplish this anti-discriminatory purpose. The draft provision would have ended discrimination against Indians in the liquor laws by replacing federal jurisdiction over liquor with state jurisdiction granted under Pub. L. 280. See Hearings on H.R. 459, H.R. 3235, and H.R. 3624 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 2d Sess. (February 28, and 29, 1952) pp. 30, 33-34; 99 Cong. Rec. 9963 (July 27, 1953). The proposed provision simply declared the discriminatory liquor laws inapplicable to those areas of Indian country subject to state jurisdiction under Pub. L. 280:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618 of this title, and the provisions of section 2141 of the

> Revised Statutes (25 U.S.C. sec. 251) shall not apply within those areas of Indian country that are subject to the provisions of section 1161 [later 1162] of this title, nor within those areas of the states named in said section 1161 that are not Indian country.

Id.

The idea of vesting states with the power to enforce liquor laws against reservation Indians received at least one letter of support. See letter dated May 1, 1951, from Minnesota Governor Youngdahl, 99 Cong. Rec. 10783 (Aug. 1, 1953). But there was strong opposition from tribes to this method of ending the absolute liquor prohibition. Hearings, supra, pp. 45, 83. They argued that the change in federal liquor laws should not be conditioned upon the assumption of state jurisdiction in Indian country. Felix Cohen, a former Associate Solicitor of the Interior Department and Chairman of Interior's Board of Appeals, as well as author of the oft-cited Indian law

treatise, Handbook on Federal Indian Law, voiced the Indian objection:

> The second thing the Indian Bureau's approach does which I think is wholly wrong is to tie together state jurisdiction and liquor, two things that never should be tied together. All of the tribes of Montana, meeting at Helena, November 27, 1951, protested against this Indian Bureau tie up to state jurisdiction and liquor, and insisted that repeal of the discriminatory law on liquor [reading]: 'Should not be made conditional upon the elimination of tribal law or codes or any other surrender of individual rights'.
>
> Now, I had thought that our standards of fair and honorable dealings had improved somewhat in the last 148 years, and I hope I am right, but I am shocked at the tie up that the Indian Bureau now proposes between the drinking of liquor and the extension of state jurisdiction, and I hope that the committee will adhere to the alternative urged by Congressman D'Ewart which is that Indians vote yes or no upon application of state law without having a

> bottle dangling in front of their noses at the time that they vote.
>
> I yield to none in my urging that the Indian liquor laws should be abolished. I don't mean the law relating to the sale of liquors on school sites. I mean the general Indian liquor laws. And that should be done independently of any extension of State jurisdiction. That should be carried through in separate legislation. Otherwise, I feel sure one will hold back the other and that the tie up itself will make both impractical of realization at this session of Congress.

Hearings, supra, at 45-46, 48.

The liquor provision was deleted from Pub. L. 280, [7] (see 99 Cong. Rec. 10783-84, Aug. 1, 1953), and P.L. 280 itself was

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7. The petitioner totally ignores this fact in arguing that the intent of §1161 was the same as P.L. 280. P.B. at 59. Moreover, the Congressional decision to delete from Pub. L. 280 the proposed liquor provision and to deal with liquor control in separate legislation leaves no doubt that Pub. L. 280 was not intended to affect liquor transactions.

subsequently construed by this Court to exclude state civil regulatory authority. See Bryan, 426 U.S. at 384, 387. States were not granted any general taxing or licensing jurisdiction over reservation Indians, nor were they granted any jurisdiction over tribal governments. Id. at 389.

H.R. 1055, the separate liquor legislation which had been introduced and which eventually became 18 U.S.C. §1161, provoked no discussion of the merits of state jurisdiction over liquor in Indian country. Such a debate would certainly be expected if Congress had intended states to have jurisdiction over Indian country liquor transactions, see Bryan, 426 U.S. at 381, especially in light of the "comprehensive and detailed . . . scrutiny" that Congress has consistently given such proposed extensions of state jurisdiction over reservation Indians. Kennerly v. District Court, supra, 400 U.S. at 426-427.

The petitioner's own arguments on this

point are unpersuasive and lack consistency. On one hand, petitioner expressly concedes that "[t]he most striking feature of the legislative history is that the legislation had nothing to do with Indian retailers or jurisdiction," P.B. at 31; [8] and, on the other, contends that §1161 is a clear and unambiguous grant of regulatory jurisdiction to the state. P.B. at 18-19, 29-30, 80.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT 18 U.S.C.§1161 CONTINUES FEDERAL PREEMPTION OF STATE LICENSING AND DISTRIBUTION OF LIQUOR IN INDIAN COUNTRY.

A. Federal Regulation Of Indian Liquor Trade Prior To §1161 Was Exclusive Both Within And Without Indian Country.

Contrary to petitioner's contentions, the federal government's role in regulating liquor transactions involving Indian people is one of the most firmly established and consistently recognized examples of federal

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8. Petitioner also concedes that "[a]t no time during the discussion in any of these [legislative] hearings was a motive other than removal of federal discrimination discussed." P.B. at 37.

preemption that can be found in case law and federal enactments. Not only has this subject area long been acknowledged as within the exclusive province of the federal government, but the federal power over liquor has been exercised far more comprehensively than other federal power over Indians.

In a number of early cases, this Court upheld Congressional regulation of liquor transactions affecting Indian people as a proper exercise of its power under the Commerce Clause. United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866). The nature of the commerce power and the authority under it to regulate liquor transactions with Indian people was held to be "exclusive and absolute". United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876); see also United States v. Sandoval, 231 U.S. 28, 46 (1913). The comprehensive nature of the powers and functions vested in the Secretary of the Interior, acting through the Commissioner of Indian Affairs,

to enforce the Indian liquor law received further elaboration in United States v. Birdsall, supra, 233 U.S. at 231-33.

Even in instances where Congress, through a state enabling act, specifically authorized a state to regulate intrastate liquor transactions involving Indians, the Court refused to construe the enabling act in a manner restrictive of Congress' power in this area. United States v. Wright, 229 U.S. 226 (1912). The Court considered these liquor transactions to be subject matter over which Congress had assumed special responsibilities. Id. at 238.

The federal power over liquor transactions involving Indian people is so broad that it extends beyond the territorial boundaries of Indian Reservations:

> The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and

> whether within the limits of a state, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes," and in part from the recognized relation of tribal Indians to the Federal Goverment. [Emphasis added.]

Perrin v. United States, 232 U.S. 478, 482 (1914); see also United States v. Forty-Three Gallons of Whiskey, supra, 93 U.S. 194; Dick v. United States, 208 U.S. 340 (1908).

This Court continues to recognize this sweeping power:

> Article I, §8, of the Constitution gives Congress power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." This Court has repeatedly held that this clause affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic

> beverages into Indian country. [Citations omitted; emphasis added.]

Mazurie, 419 U.S. at 554. The congressional power encompasses the authority to regulate non-Indian as well as Indian liquor activities on Indian reservations and to delegate that authority to tribal governments. Id. at 554.

In Mazurie, this Court also indicated that §1161 continued federal pre-emption of state jurisdiction. The court noted that Congressional regulation in an area designated as Indian country has been presumed to supersede state jurisdiction. 419 U.S. at 555. In Antoine v. Washington, 420 U.S. 194, 203-204 (1974), current federal liquor legislation for Indian country was cited as an example of federal preemption.

Congress has confirmed its preemption of state control through a long history of federal statutes regulating liquor transactions that could affect Indian people. In 1802, the President of the United States was

given specific authority to prevent or restrain the vending or distribution of liquor among Indian tribes. Act of March 30, 1802, ch. 13, §21, 2 Stat. 139, 146. In 1832, the introduction and sale of liquor in Indian country became a federal crime. Act of July 9, 1832, ch. 174, §4, 4 Stat. 564. In 1918, to aid in the enforcement of the Indian liquor laws, Congress made possession of liquor in Indian country an independent offense. Act of May 25, 1918, ch. 86, §1, 40 Stat. 561, 563. Through various provisions, Congress has limited access to liquor in areas adjacent to Indian reservations and within territory ordinarily considered outside Indian country. See, e.g., Act of June 20, 1910, ch. 310, §2, 36 Stat. 557; COHEN, HANDBOOK Of FEDERAL INDIAN LAW 353 (1942). Since 1834, Congress has prohibited distilleries in Indian country. 25 U.S.C. §251. And, until 1953, Congress continued to prohibit absolutely the introduction, possession, or sale of liquor in Indian coun-

try. [9] See 18 U.S.C. 1154, 1156. These federal prohibitions remain in effect today; except as authorized under 18 U.S.C. §1161. See discussion, supra, at Section I.

These statutes and cases leave no doubt that the federal government has traditionally exercised exclusive authority to regulate liquor transactions on Indian reservations, and that in this area it has exercised its plenary power in a comprehensive and preemptive manner. It is also firmly established in recent decisions of this Court that where Congress regulates a subject matter comprehensively, that fact alone precludes state jurisdiction. Warren Trading Post, 380 U.S. at 689; Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160, 165 (1980) ["Central Machinery"]; White Mountain Apache Tribe, 448 U.S. at

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9. The term "Indian country" as used in 18 U.S.C. 1161 is defined in 18 U.S.C. 1151 and 1154. That term includes the Pala Indian Reservation.

143; Ramah, 73 L. Ed 2d at 1179-80. Moreover, "federal preemption is not limited to those situations where Congress has explicitly announced an intention to preempt state activity." Ramah, 73 L.Ed 2d at 1180.

> We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.

White Mountain Apache at 144, citing Warren Trading Post, supra. This Court recently applied this principle with similar force in a non-Indian law context. Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, ___ U.S. ___, 73 L. Ed 2d 664, 675 (1982).

The Court of Appeals correctly recognized that, unless 18 U.S.C. §1161 contains authorization for the state to enforce its liquor laws against Indian persons and tribes in Indian country, there is no basis for concluding that Congress has abandoned its long-standing preemption of state juris-

diction over liquor matters in Indian country. That authorization, as explained in Section I(A), supra, must be express and cannot be implied.

B. The Comprehensive Licensing And Enforcement Provisions Of The Federal Indian Traders Act, Which Apply To Mrs. Rehner's Activities, Were In Place Long Before 18 U.S.C. §1161 Was Enacted And There Is No Evidence That Congress Intended To Modify This Preemptive Federal Scheme To Include A State Licensing Requirement.

The federal government's control of Indian trade to the exclusion of state control is not limited to the regulation of liquor, but has historically extended to all areas of commerce with Indians and Indian tribes on their reservations.

At the time that §1161 was enacted there was, and remains today, a comprehensive federal statutory scheme for licensing and regulating persons who engage in trade with Indians and Indian tribes. See 25 U.S.C. §261 et seq.; 25 C.F.R. Part 140 (1982). These federal statutes and regulations determine who may engage in such

trade, 25 U.S.C. §261 et seq., 25 C.F.R. 140.1; what types of tribal contracts may be enforced, 25 U.S.C. §81; what types of credit and payment terms are authorized, 25 C.F.R. §140.23-.24; and even what prices may be charged and what types of merchandise may be sold. 25 C.F.R. §140.16-.22. One regulation specifically authorizes criminal prosecution and license revocation for traders' violations of applicable liquor laws. 25 C.F.R. §140.18. Such federal regulations "have no less preemptive effect than federal statutes." Fidelity Federal S. & L. Ass'n. v. de la Cuesta, supra, 73 L. Ed 2d at 675.

This comprehensive scheme is administered by the Department through the licensing and regulation of "Indian Traders." It was enacted to protect Indians from exploitation by unethical traders, see Ashcroft v. United States Dept. of Interior, 679 F. 2d 196, 198 (9th Cir. 1982), in response to a Congressional determination that the federal

government needed to strengthen its control of the trade. See 4 Cong. Rec. 3639, 3906-3926 (44th Cong., June 30, 1876). In passing §1161, Congress made no mention of any intent to alter this scheme by allowing states to impose additional licensing or other regulatory burdens where Indian country liquor trade was involved. In essence, petitioner urges this Court to hold that Congress impliedly qualified the Federal Indian Traders Act to allow states to impose these additional burdens on Indian traders who engage in the sale of liquor. 10/ Such a result cannot be squared with recent decisions of this Court which have expressly rejected state attempts to impose similar burdens on licensed Indian traders.

In Warren Trading Post, 380 U.S. 685, this Court discussed the federal government's general regulatory authority over

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10. Mrs. Rehner is a licensed Indian trader. J.A. 7, 21-22.

Indian traders and its preemptive effect on state jurisdiction:

> Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Art. I, §8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject. [Emphasis added.]

Id., 380 U.S. at 691 n. 18.

Petitioner argues against the applicability of Warren Trading Post by implying that the State's right to regulate liquor is more sacrosanct than even its power to tax. P.B. at 27, 90-91. But the power to tax is at least as basic as the power to regulate trade, and the federal policy of non-interference with state taxing matters is extremely strong. See, e.g., 28 U.S.C. §1341. Yet even in the face of such

strongly mandated federal deference to state taxing powers, this Court has never upheld a state tax on reservation Indians. See, e.g., McClanahan, 411 U.S. at 181; Moe, 425 U.S. at 480-81; Bryan, 426 U.S. at 390; Washington v. Confederated Tribes Of The Colville Indian Reservation, 447 U.S. 134, 163 (1980) ["Colville"]. Nor has it hesitated to strike down state attempts to tax reservations activities (even where the incidence of the tax was admittedly on non-Indian persons or entities) where such activities were subject to a preemptive federal regulatory scheme. See, e.g. White Mountain Apache Tribe, 448 U.S. at 151; Central Machinery, 448 U.S. at 165-66; Ramah, 73 L. Ed 2d at 1186.

The petitioner nevertheless argues that because there is a lack of detailed federal regulations governing Indian country liquor transactions, less preemptive force should be given to federal regulation of liquor than was afforded in cases such as Warren

Trading Post. P.B. at 91-92. However, the lack of detailed federal regulations, rather than representing a Secretarial belief that "the states are the ones to regulate liquor traffic" (P.B. at 92), instead represents a congressional decision to share regulatory jurisdiction with tribes through the enactment and enforcement of Department-approved tribal liquor ordinances. 18 U.S.C. §1161; Mazurie, 419 U.S. 544. Because these ordinances vary greatly, depending on the needs and desires of the individual tribes, general federal regulation would be either duplicative or contradictory, and hence inappropriate. Moreover, Central Machinery, 448 U.S. 160, held that it is the existence of the federal statutory scheme, not its administration or operation, that ousts state authority. Id. at 165. Any lack of specific federal regulation is therefore a natural incident of this decentralization and partial delegation to tribes of preemptive federal control.

C. Congress' Express Provision In 18 U.S.C. §1161 For Federal Review Of Tribal Liquor Ordinances Is Further Evidence Of Federal Preemption.

Section 1161 provides that the Secretary of Interior certify and publish tribal liquor ordinances adopted "by the tribe having jurisdiction over such area of Indian country." In the certification process, the Secretary routinely reviews and approves the ordinance. By inserting this provision, Congress established federal review of tribal authority under §1161 to lift the absolute prohibition of the Indian liquor laws.

Recently, in Merrion, 448 U.S. 160, this Court reviewed a tribal oil and gas severance tax to determine whether it violated the Interstate Commerce Clause. The Court found that its review of the tribal severance tax was necessarily limited in scope because Congress had affirmatively acted, pursuant to its authority under the Indian Commerce Clause, to establish a

series of "federal check-points" to insure that the exercise of tribal authority was consistent with the congressional scheme under the Indian Reorganization Act, 25 U.S.C. §§476, 477. Id., 71 L Ed 2d at 40-41. In Merrion, as in the case at bar, one of the federal check-points was Secretarial approval of the tribal ordinance which authorized the tax. The Court found that the tax ordinance had received the requisite Secretarial approval and, therefore, "[t]his course of events fulfilled the administrative process established by Congress to monitor such exercise of tribal authority." Id.

This case is closely analogous to Merrion because Congress through §1161 has affirmatively acted to establish an administrative process to monitor the exercise of tribal authority. The Court of Appeals observed that the Secretarial review required by §1161 was a congressional indication "that the regulatory authority of

the tribes which was the subject of §1161 was safeguarded by federal supervision." Rehner, 678 F. 2d at 1349.

Here there is no question that the Pala Band's liquor ordinance was passed in accordance with the congressional scheme established by 18 U.S.C. §1161, and that the Secretary has similarly reviewed and approved other more detailed tribal liquor ordinances (see Rehner at 1342 [discussing the liquor ordinances of the Tulalip and Muckleshoot Tribes]) without any qualification that state licensing jurisdiction applies to the same conduct authorized by tribal law. On the contrary, the official position of the Secretary has consistently rejected any such reading of the statute. See discussion, supra, at Section II. This Secretarial review process, accompanied by the federal enforcement power, is a significant factor demonstrating persistent federal presence and vigilance where Indian country liquor transactions are concerned.

V. IMPOSITION OF A STATE LICENSING REQUIREMENT ON INDIAN RETAILERS SUCH AS MRS. REHNER WILL DIRECTLY INTERFERE WITH TRIBAL SELF-GOVERNMENT.

A. 18 U.S.C. §1161 Established The Conditions Under Which Indian Tribes Could Exercise Their Inherent Preexisting Power Over Indian Liquor Trade Within Indian Country And Delegated A Share Of The Preemptive Federal Power Over Such Trade To The Tribes.

Petitioner asserts residual state authority extending to the licensing of all liquor traffic within its borders, even in Indian country. Indeed, petitioner maintains that §1161

> . . . was not a matter of Congress conferring authority on the states over liquor traffic with Indians, it was a matter of increasing the scope of that authority.

P.B. at 43.

Petitioner's statement is persuasively rebutted by the plenary power that Congress has exercised over liquor transactions with Indians, regardless of state lines, since the earliest years of this nation. See Section IV(A), supra, and cases cited

therein at pp. 47-50.

The jurisdiction that petitioner baldly asserts is not an inherent aspect of state police power, nor does it spring from a grant or transfer of federal power. Prior to the imposition of federal laws restricting liquor traffic with Indians, the Indian tribes retained full inherent power, as a fundamental attribute of their sovereign status, to regulate liquor transactions with their members and within their territory. It was their inability to deal with the tragic and devastating effects of this new substance -- a substance foreign to their history and culture -- that led to the imposition of federal control. Significantly, "the first federal control measure was enacted, at least in part, in response to the verbal plea of an Indian chief to President Thomas Jefferson" complaining of the disastrous effects of this "fatal poison" upon his people. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 306 (1982 ed.).

Congress has never divested tribes of their inherent power to regulate the activities of their members, United States v. Wheeler, supra, 435 U.S. 313, including the sale and distribution of liquor within their territory. The passage of the federal Indian liquor laws, however, required that this aspect of inherent tribal power yield to superseding federal power under the Indian Commerce Clause. As a result, inherent tribal power over liquor lay dormant [11] under preemptive federal control for more than a century -- and remains so today on those reservations where the absolute ban of the federal Indian liquor laws has not been lifted -- until Congress enacted §1161 in 1953. By enacting §1161, Congress provided a mechanism for removal, under certain conditions, of the federal

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11. ". . . sovereign power, even when unexercised, is an enduring presence . . ., and will remain intact unless surrendered in unmistakable terms." Merrion, supra, 71 L. Ed 2d at 36.

impediment, imposed by the federal Indian liquor laws, to the exercise of this inherent tribal power. [12/] The Court of Appeals agreed that the statute reflects congressional recognition of this inherent tribal power:

> A close reading of the statute then reveals that Congress recognized the tribes' jurisdiction over liquor transactions . . .

Rehner, 678 F. 2d at 1345. But Congress also went further by specifically delegating to the tribes a share of its own power to regulate liquor transactions in Indian country. See Mazurie, 419 U.S. at 553-54.

Thus, in Mazurie, when confronted with a direct challenge to the congressional

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12. Congressional acknowledgment that the tribes possess such authority over their members and territory, independent of a grant or delegation of Congressional power, is found in the phrase "tribe having jurisdiction over such area of Indian country . . ." See 18 U.S.C. §1161. This inherent authority has "not been divested by Congress or by necessary implication of the tribe's dependent status." Colville, 447 U.S. at 152.

power to regulate liquor transactions by non-Indians within Indian country, the Court faced the issue squarely and concluded that

> . . . federal authority was properly delegated to the Indian tribes. We conclude that federal authority is adequate, even though the lands were held in fee by non-Indians, and even though the persons regulated were non-Indians.

Id. Not only was this broad delegation of authority proper, it was also vested in tribal entities that possessed independent authority over the subject matter. This is made explicit by the following statement:

> . . . when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. * * * It is necessary only to state that the independent tribal authority is quite sufficient to

> protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes." [Emphasis added.]

Id. at 557.

B. Application Of The California Liquor Licensing Scheme To Mrs. Rehner's On-Reservation Activities Will Directly Interfere With A Tribal Governing Process That Is Specifically Sanctioned By Congress.

Allowing California to license liquor sales by Mrs. Rehner could totally frustrate the Pala Band's decision to lift the federal prohibition against the sale of liquor on the Pala Reservation. Since the California licensing scheme is a "quota" system, a license may not be available even if an applicant meets other licensing criteria. Even if a license were available, the State could refuse issuance for a wide variety of reasons. Or an applicant, like Mrs. Rehner, might simply lack the funds to purchase a state liquor license on the open market if none were available through the State's lottery/quota system. See discussion below.

This Court in White Mountain Apache Tribe, 448 U.S. 136, held that a state's interference with tribal self-government "standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." Id., 448 U.S. at 143. Though the Court of Appeals found it unnecessary to reach this issue because of its determination that §1161 has preemptive effect (see Rehner, 678 F. 2d at 1349 n. 18), it is a sufficient alternative basis for precluding state licensing of Mrs. Rehner.

A review of the California liquor scheme demonstrates that it comes into direct conflict with the Pala Band's authority to decide whether or not liquor can be sold on the Pala Reservation. The number of licenses that are issued are limited by the State (one per 2500 inhabitants of each county). California Business & Professions Code §23817 (hereinafter "B.&

P. Code"). The application for a general off-sale license must be accompanied by a fee of $6,000.00. [13/] B.& P. Code §23954.5. One lottery per county is held each year if there are more applicants than licenses available (a typical situation); and numbers drawn in the lottery determine "priority to be given to the consideration of [an]

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13. The united States in its amicus brief before the Ninth Circuit characterized this license fee as "blatantly a tax imposed on the privilege of engaging in the liquor business." Brief For The United States As Amicus Curiae, p. 17. The proceeds from license fees are not targeted for administration of state liquor laws but are deposited in the State's general fund. B. & P. Code §23954.5. Similar state taxes were struck down in the context of state attempts to license and tax non-Indians doing business on a reservation in White Mountain Apache Tribe, supra, (motor carrier license tax) and Ramah, supra, (gross receipts tax). In White Mountain Apache this Court observed:

> We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme . . .

Id., 448 U.S. at 150. See, also, Ramah, supra, 73 L. Ed 2d at 1184.

application; but shall not insure the issuance of a license . . ." B. & P. Code §23961. Upon receipt of an application for a license, written notice of the application is required to be given to the sheriff, chief of police, and district attorney of "the locality in which the premises are situated, if in unincorporated territory, and to the city council or other governing body of the city in which the premises is situated . . ." B. & P. Code §23987. Protests may be filed to the issuance of a license. If a public officer or agency, or the governing body of a city or county, protests, a hearing must be held. B.& P. Code §24013. Issuance of new liquor licenses, and inter-county transfers of existing licenses, are based on population increases; this limitation is tied to §23817's limit of one license per 2500 inhabitants. B. & P. Code §§23817 and 23821. Because of the strict limitations on new licenses, there is an active market for

the sale and transfer of existing licenses. At the time that Mrs. Rehner filed her complaint in 1977, the fair market value of a state liquor license was approximately $55,000. J.A. 9. The California liquor license fee requirement and lottery/quota scheme raise formidable, if not insurmountable, regulatory and economic barriers to obtaining a state liquor license. Moreover, the potential involvement of and deference given to city and county governments and officials under the statutory scheme would be particularly intrusive and could

> . . . altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities.

Santa Rosa Band of Indians v. Kings County, supra, 532 F. 2d at 664.

Petitioner asserts that permitting the coexistence of state and tribal licensing

jurisdiction in Indian country will promote equality among Indians and non-Indians, [14] and will eliminate the discriminatory effect of the federal Indian liquor laws. P.B. at 37-38. [15] Imposing the full scope of state liquor licensing jurisdiction on reservation Indians and activities distorts the language and intent of §1161. Such an argument also ignores recent decisions by this Court that have rejected state licensing and regulation of tribal members. See e.g., Moe, 425 U.S. at 480-81; McClanahan, 411 U.S. at 173, 179; Bryan, 426 U.S. at 390.

Even though the Pala Tribal Council has

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14. The assimilationist argument made by petitioner as a basis for subjecting reservation Indians to the full panoply of state liquor laws is similar to that made and expressly rejected in Santa Rosa Band of Indians v. Kings County, supra, at 661.

15. The actual effect of imposing state licensing authority could very well perpetuate the kind of discrimination that provided the impetus for passage of §1161. California's license quota system could result in "dry" (no liquor vendors) Indian reservations in an otherwise "wet" state.

determined, in accordance with the provisions of §1161, that liquor can be sold on the Pala Reservation, petitioner would attribute to Congress an intent to impose a state licensing scheme that could totally nullify that determination. Such a result cannot possibly be squared with the language or intent of §1161, or with traditional notions of tribal sovereignty and self-government. As Bryan points out, such imposition of state regulatory power could "result in the undermining or destruction of . . . tribal governments . . . and a conversion of the affected tribes into little more than 'private voluntary organizations.'" Id., 426 U.S. at 388.

VI. THE COURT OF APPEALS PROPERLY HELD THAT STATE AUTHORITY UNDER THE TWENTY-FIRST AMENDMENT HAS NO ROLE TO PLAY IN INDIAN COUNTRY.

A. The Twenty-first Amendment Did Not Increase State Jurisdiction.

Though this Court has recognized that the Twenty-first Amendment imposes some

limitations on Congress' power to regulate interstate commerce, it has expressly held that the Amendment did not increase state jurisdiction over areas under federal control. Collins v. Yosemite Park Co., 304 U.S. 518, 538 (1938); United States v. Tax Commission of Mississippi, 421 U.S. 599, 613 (1975). In United States v. Tax Commission of Mississippi, this Court further held that state jurisdiction over liquor transactions under the Twenty-first Amendment did not depend upon whether a particular federal reservation is subject to "exclusive" or "concurrent" federal jurisdiction. Id. at 613-614. In upholding the continuation of federal tax immunities for liquor destined for delivery on a military base which was subject to "concurrent" jurisdiction, the Court flatly rejected the application of Mississippi's tax laws. Id.

Even as to interstate commerce, the State's authority, as petitioner readily admits (P.B. at 88), is subject to constitu-

tional restraints. See, e.g., Larkin v. Grendel's Den, Inc., 5 U.S.L.W. 4025, 4027 (December 13, 1982); California Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 106-14 (1980); Craig v. Boren, 429 U.S. 190, 204-206 (1976). In Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964), this Court reviewed many of the cases cited by New York in that case for the proposition that the Twenty-first Amendment effectively repealed the Commerce Clause as to regulation of liquor and held that such an implied repeal was an "absurd over-simplification" and would have left Congress with "no regulatory power over interstate or foreign commerce in intoxicating liquor." Id., 377 U.S. at 331-32. The Court also reiterated the principles established in Collins v. Yosemite Park Co., supra, 304 U.S. 518, and later affirmed in Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944), and United States v. Tax Comm'n. of Mississippi, supra, that federal areas

within a state were not considered to be a state or territory within the meaning of the "delivery or use therein" language of the Amendment.

Petitioner suggests that despite the express holdings of these cases this Court should engage in a balancing of tribal, federal and state interests in resolving the issue in this case. Hostetter itself provides a partial response to the petitioner's balancing argument. There the Court held that conflicts between a state's regulatory power under the Twenty-first Amendment and the command of other constitutional provisions must be considered "in the context of the issues and interests at stake in any concrete case." Id., 377 U.S. at 332. Respondent disavows the appropriateness of such a balancing test where the State seeks licensing authority over a reservation Indian; but even if such a balancing test were applied, the State's interests could not prevail over the

significant federal and tribal interests at stake in this case. Here the state is asserting regulatory power over subject matter [Indian country liquor transactions] and persons [reservation Indians] where federal control has historically excluded any exercise of state jurisdiction.

Any balance between federal, tribal and state interests was struck by Congress when it enacted §1161, some twenty years after adoption of the Twenty-first Amendment. This balance preserves exclusive federal/tribal jurisdiction while requiring that "acts or transactions" involving liquor in Indian country be in harmony with basic state policies regarding the control of intoxicating liquor. If this balance should prove to be unwieldy or unsuccessful in application, it is for Congress, not this Court, to make the necessary adjustments.

A. In Enacting 18 U.S.C. §1161 Congress Was Fully Aware Of The Limited Scope Of State Regulatory Power Under The Twenty-first Amendment.

Petitioner argues that construing §1161 in light of the Twenty-first Amendment leads inevitably to the conclusion that Congress intended to permit state regulation of liquor transactions in Indian country. P.B. at 46, 50. To reach this conclusion would require this Court to ignore (1) the clear import of its early decision in Collins v. Yosemite Park Co., supra, 304 U.S. 518, decided prior to passage of §1161 and five years subsequent to passage of the Twenty-first Amendment; (2) the fact that the federal government had for more than a century prior to §1161 exercised exclusive authority over liquor traffic in Indian country; and (3) the absence of any mention of the Twenty-first Amendment, and of any discussion concerning state licensing and distribution jurisdiction over liquor, in the legislative history of §1161. 16/ (footnote on next page)

Petitioner's assertion that Congress in 1953 recognized the "states' plenary authority over liquor traffic within their borders" (emphasis added; P.B. at 46) assumes a Congress ignorant of its power and uninformed as to the prevailing case law. Such an assumption cannot stand; Congress, like all persons, is presumed to know the law. Cannon v. University of Chicago, 441 U.S. 677, 696-99 (1979). [17] In enacting §1161 Congress had every reason to believe that neither the states' general police power nor the Twenty-first Amendment had anything to do with regulation of liquor in Indian country.

In 1938, this Court had determined that

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16. The Court of Appeals found this to be "[p]erhaps the most compelling feature" of §1161's legislative history. Rehner, 678 F. 2d at 1347.

17. ". . . it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." Id. at 699.

the Twenty-first Amendment did not authorize state seizure of a liquor shipment to a national park or the enforcement of state permit and tax laws against the park's liquor concessionaire. Collins, supra, 304 U.S. at 538. The Court said:

> The lower court was of the opinion that though the Amendment may have increased "the state's power to deal with the problem ..., it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

This decision predated §1161 by fifteen years and remains the authoritative decision

on the question of whether state jurisdiction under the Twenty-first Amendment applies in areas subject to federal control. More recent decisions of the Court have confirmed its continuing vitality. See, e.g., United States v. Tax Comm'n of Mississippi, supra, 421 U.S. at 613 (1975); Johnson v. Yellow Cab Transit Co., supra, 321 U.S. 383.

Congress was also acutely aware of the exclusive and, in certain aspects, oppressive nature of the federal government's comprehensive and exclusive regulation of matters relating to the interests and property of Indian people. This perception by Congress is reflected in the fact that the impetus for enacting §1161 was to eliminate the admittedly discriminatory effect of various federal laws, including the federal Indian liquor laws. See Hearings on H.R. 1055 before the House Committee on Interior and Insular Affairs. (P.B., Vol II at A-52, A-53).

If the State's authority to regulate liquor under the Twenty-first Amendment was as "plenary" as petitioner asserts, there would have been little inducement or need for Congress to concern itself with a federal scheme that, under petitioner's analysis, could not have prevailed over state regulatory power under the Amendment. Even those amici states who offer their views in support of petitioner cannot concur with this absurd contention:

> Prior to the enactment of §1161, virtually all sale and possession of liquor within Indian country was banned under federal law. [Citations omitted.] The practical effect of this ban was that no room was left for state or tribal regulation. [Emphasis added.]

Amicus Br. of State of Minn., et al. at 11.

Moreover, if Congress believed the Commerce Clause had been repealed by the Twenty-first Amendment and that it was absolutely bound by state liquor laws, it would not have provided in §1161 for the

continued application of federal laws which prohibited liquor introduction, distribution and possession in Indian country regardless of whether the surrounding state was "wet." And in the years between adoption of the Twenty-first Amendment and §1161, Congress would not have repeatedly legislated on the subject of liquor in Indian country without regard to whether state law permitted or prohibited the conduct with which it was concerned. See, e.g., 18 U.S.C.A. §§1154, 1156, and Reviser's Notes. Whatever authority Congress may have thought the Twenty-first Amendment gave states in interstate commerce transactions, it had no reason to believe its plenary authority over Indian commerce had been altered.

It is also noteworthy that, in 1953, the State of California itself was aware of its lack of jurisdiction over liquor transactions involving Indians both within and without areas of Indian country within the state. Representative Engle, one of the

members of the House of Representatives Committee on Interior and Insular Affairs stated during consideration of H.R. 1055 (eventually enacted as §1161) that California's repeal of its own law prohibiting the sale of liquor to Indians had not changed the federal Indian liquor prohibition:

> I made a check on the situation to see whether or not Federal regulations would apply exclusively upon Indian territory, and much to my surprise I found out that Federal law is broad enough so that you could hardly sell liquor to an Indian anywhere and be safe, whether it was on a reservation or not.

P.B., Vol. II, Appendix C at A-74.

In light of the myriad cases decided under the Indian Commerce Clause in general, and under the federal Indian liquor laws in particular, Congress when it enacted §1161 must be assumed to have understood the law on its plenary authority over Indian people and Indian commerce. Cf. Cannon v. Univer-

sity of Chicago, supra, 441 U.S. at 696-99 [Congress' knowledge of existing law]. If it had believed that the states' interests and power under the Twenty-first Amendment were overriding, as petitioner asserts, it would have demonstrated this by mentioning the Amendment in its consideration of §1161 or would otherwise have taken action consistent with such recognition. It is revealing, as well as fatal to petitioner's argument, that Congress did neither.

VII. PETITIONER'S UNFOUNDED FEARS OF REGULATORY ENFORCEMENT PROBLEMS PROVIDE NO BASIS FOR REVERSING THE COURT OF APPEALS.

A. The Record Does Not Support Petitioner's Representation That Tribal And Federal Regulation Of Indian Country Liquor Transactions Is, Or Will Be, Ineffective Or Irresponsible.

Petitioner argues that the Court of Appeals' decision "renders the criminal sanctions virtually unenforceable" and declares that the results of the decision will be "unworkable" for a variety of reasons (P.B. at 74), devoting an entire

section of its brief to hypothesizing possible insoluble problems that it claims will inevitably arise. See, generally, P.B. at 67-81.

This case was decided solely on the pleadings in the district court on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) without presentation of matters outside the pleadings that might have transformed it into a FRCP 65 summary judgment motion. See, Judgment, J.A. 18. It is difficult to respond to many of petitioner's arguments without the benefit of a factual record. Of course, the general rule is that, on a motion to dismiss, plaintiff's pleadings are accepted as true and the allegations therein construed in favor of plaintiff, and factual issues outside the pleadings are not considered. Cannon v. University of Chicago, supra, 441 U.S. at 681; Carter v. Stanton, 405 U.S. 669, 671 (1972); 5 Wright & Miller, Federal Practice and Procedure, §1357 at

594-96 (1969).

Petitioner has attempted to expand this narrow licensing case to one of broad import concerning conjectural regulatory enforcement problems. While respondent entertains some doubts as to the propriety or wisdom of considering such issues in this context, prudence requires some response to petitioner's allegations.

B. The Actual Experience With Tribal Regulation Of Liquor In Other States Does Not Support The Hypothetical Problems Raised By Petitioner.

The most effective rebuttal to petitioner's fears is to look to the situations where proprietors on Indian reservations are not required to obtain state liquor licenses. The primary example is in the Tenth Circuit, where, as a result of the decision in United States v. New Mexico, supra, 590 F. 2d 323, the Mescalero Apache Tribe has operated its Inn of the Mountain Gods for several years without a state liquor license. As pointed out in the

Mescalero Tribe's amicus brief in the instant case, the problems envisioned by petitioner have simply not developed. 18/ The Mescalero situation illustrates methods by which tribal and state governments, meeting and cooperating on matters of mutual concern, may resolve many of the problems feared by petitioner. Additionally, although factual details are not in our record, the lack of any amicus brief or subsequent reported litigation may imply that a similar accommodation has been reached in North Dakota, subsequent to the 1977 decision in Zaste v. North Dakota, Civil No. A1-75-29 (D.N.D. 1977), which struck down state liquor license requirements on Indian reservations in that

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18. It is interesting to note that New Mexico did not participate as an amicus in the instant case along with the other states who filed briefs in support of petitioner. The State of Washington also chose not to file an amicus brief on the merits, presumably as a result of the settlement it reached with the Muckleshoot Tribe, as discussed below.

state.

Also illuminating are the compromise solutions that have been and are being worked out elsewhere. Chief among these is the State of Washington's settlement with the Muckleshoot Tribe, as detailed in that Tribe's amicus brief. In addition, the State of Montana has adopted a temporary policy which allows the Confederated Salish & Kootenai Tribes to operate a reservation liquor outlet without obtaining a state liquor license (see Amicus Curiae Brief Of The State of Montana at 5-6, n. 8); and that state, while still apprehensive, reports no operational problems in its brief.

Thus, rather than making an attempt to rebut petitioner's hypothetical problems with equally hypothetical possible solutions, respondent merely observes that other states have apparently been able, or feel confident in their ability, to work out any problems as they arise. It is also significant, in light of petitioner's unbased

representations to this Court, that none of the amici in support of petitioner has pointed to any facts demonstrating that tribal regulation of reservation liquor sales has been irresponsible. On the contrary, those amici focus primarily on public policy and economic interests that they hypothesize will be impaired or frustrated by tribal regulation of the sale and distribution of liquor in areas of Indian country within their respective states.

C. The California Legislature's Acquiescence To The Court Of Appeals' Decision Undercuts Petitioner's Arguments That Tribal/Federal Regulation Of Reservation Liquor Is Unworkable.

Petitioner's argument that the Court of Appeals' decision is "unworkable," and that California cannot realistically cope with the results of the decision (see, e.g., P.B. at 67-81), also ignores the fact that the California Legislature recently passed an amendment to B. & P. Code §23384, which added persons engaged in the liquor business

on Indian Reservations to the list of non-licensees eligible to buy liquor from California wholesalers. Chapter 906, 1982 Calif. Legis. Serv. 4913 (West). Under applicable California law, the passage of that amendment signified an acquiescence to and acceptance of the Court of Appeals' decision in this case. It further indicates that the Legislature did not consider the potential problems to be insurmountable, and that California felt capable of working out any problems on a case-by-case basis as they arose.

Respondent, in her Brief in Opposition to Certiorari, argued that passage of the amendment effectively mooted the controversy by showing that California's legislative and executive branches had conceded the State's lack of authority to license Indian reservation liquor traders. Petitioner fails to address the impact of Chapter 906 in its brief, but respondent continues to believe that enactment of that

bill clearly indicates the Legislature's intent to acquiesce in the Court of Appeals' decision. Whether the passage of the bill completely moots the case or not, it seriously weakens many of petitioner's arguments by showing that the Legislature itself was not convinced of the seriousness of the dangers and problems envisioned by petitioner.

In enacting Chapter 906, the Calfiornia Legislature clearly accepted the Court of Appeals' decision:

> It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provisions that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesed in the previous judicial construction.

Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 734-35; 180 Cal. Rptr. 496, 504-5; 640 P. 2d 115, 123 (1982). Although §1161 is of course not part of California's statutes,

the Legislature's decision by necessary implication invalidated California's provision requiring all retail sellers of liquor to obtain a state license. See, B. & P. Code §23300. The wholesaler's provisions that were recently amended, B. & P. Code §23384, are a part of that general statute dealing with the licensing of liquor sellers.

As in Marina Point Ltd. v. Wolfson, supra, and Cannon v. University of Chicago, supra, 441 U.S. 667, the presumption of legislative knowledge is actually unnecessary since here the legislative documents establish beyond question that the California Legislature was aware of the decision in Rehner and enacted the new law in direct response to it. See, Staff Analysis of Senate Bill 1888, Appendix A-1 to Respondent's Brief in Opposition to Certiorari ["This bill is . . . in response to the recent court decision in Eva Reiner (sic) v. ABC."] This action "represents a

legislative endorsement" of the decision in this case. Marina Point, Ltd. v. Wolfson, supra, 30 Cal. 3d at 735.

Such a responsive legislative act often moots the underlying case. Kremens v. Bartley, 431 U.S. 119 (1977); Johnson v. Mississippi, 586 F. 2d 387 (5th Cir. 1978). Even if it does not go that far, the Legislature did authorize state liquor wholesalers to sell to reservation retailers who do not have a state liquor license. This act removed the state licensing requirement as to on-reservation liquor retailers, and also indicates a legislative judgment that such a liquor distribution system would not present insurmountable administrative or enforcement problems.

In addition, at the time of the bill's passage, the committee report indicated "no known opposition," presumably including opposition from petitioner's agency, the California Alcoholic Beverage Control Department. Such departmental silence and

legislative acquiesence imply a far different state of affairs than that painted in petitioner's brief. Instead of a scenario of total decontrol and chaotic reservation liquor trade unrestrained by laws or standards, it implies a far more positive view of the situation. The fact that Chapter 906 was enacted without even passing opposition by the very department that petitioner directs graphically reveals the hypothetical nature of the rhetoric that petitioner so freely employs to disparage tribal governing capacity. This Court should address this case on its facts, not on petitioner's imagined fears.

CONCLUSION

For these reasons, the decision of the Court of Appeals reversing the District Court and holding that the State of California has no authority to require respondent, a reservation Indian, to obtain a state liquor license, should be affirmed.

Respectfully submitted,

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January 27, 1983

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